

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

ISAAC AVENDANO, *et al.*,

3:13-cv-00168-HDM-VPC

Plaintiffs,

v.

**ORDER**

SECURITY CONSULTANTS GROUP,

*et al.*,

Defendants.

Before the court is plaintiffs' motion to strike (#114) union defendants' show cause and supplemental briefs (#s 109 and 110). Union defendants filed these briefs as required by the court's order to show cause (#105). Union defendants timely opposed the motion to strike (#117), and plaintiffs replied (#119). This order follows.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

This case concerns the employment of plaintiffs Isaac Avendano and Rolando Duenas ("plaintiffs") as federal building security officers, and various federal and state law claims arising therefrom against their employer ("corporate defendants") and union ("union defendants").

On September 12, 2014, the court entered a show cause order against union defendants and their counsel, Robert B. Kapitan ("Kapitan") for a collection of misrepresentations Kapitan made at a January 10, 2014 hearing (#105) regarding the status of a complaint before the Disciplinary Counsel of the Ohio Supreme Court ("ODC") against plaintiffs' counsel, John. A. Tucker Co., LPA ("Tucker"). Therein, the court excerpted Kapitan's statements, and ordered:



1 *NASCO, Inc.*, 501 U.S. 32, 44-45 (1991); *Spurlock v. F.B.I.*, 69 F.3d 1010, 1016 (9th Cir. 1995)); *see*  
2 *also Mazzeo v. Gibbons*, No. 2:08-cv-01387-RLH-PAL, 2010 WL 3910072 (D. Nev. Sept. 30,  
3 2010).

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5 In *Mazzeo v. Gibbons*, a Court in this District explained several proper bases for exercising  
6 the power to strike under Rule 12. 649 F. Supp. 2d 1182 (D. Nev. 2009).

7 Under Rule 12(f)[,] a “court may strike from a pleading . . . any redundant, immaterial,  
8 impertinent, or scandalous matter.” Matter is “immaterial” if it has no bearing on the  
9 controversy before the court. Allegations are “impertinent” if they are not responsive  
10 to the issues that arise in the action and that are admissible as evidence. “Scandalous”  
11 matter is that which casts a cruelly derogatory light on a party or other person.  
12 *Id.* at 1201-02 (internal citations omitted). Although the court did not apply these particular bases  
13 under its inherent power, courts in this district have reasoned that the inherent power to strike may  
14 be exercised against motions and affidavits that fail to comply with the Federal Rules of Evidence  
15 and Civil Procedure. *USF Ins. Co. v. Smith’s Food and Drug Ctr.*, No. 2:10-cv-0513-RLH-LRL,  
16 2011 WL 1326008, at \*2 (D. Nev. Apr. 6, 2011). Accordingly, even where a paper is not a  
17 “pleading” for the purposes of Rule 12(f), the court may exercise its inherent power to strike  
18 redundant, immaterial, impertinent, or scandalous filings when administration of justice so requires.

### 19 III. ANALYSIS

20 Applying these standards to the instant case, the court grants in part and denies in part  
21 plaintiffs’ motion to strike.  
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23 Sullivan Affidavit and Email Correspondence (#s 109-1 and 109-2). The court denies the  
24 motion to strike these papers, except as to paragraph four of the affidavit and the email  
25 correspondence. The court agrees with plaintiffs that the affidavit is largely immaterial. However, it  
26 is not prejudicial and provides background that, at minimum, is mildly relevant to the events that  
27 gave rise to the court’s show cause order.  
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1 Paragraph four and the email exhibit, however, relate only to union defendants' apparent  
2 reasons for terminating their prior representation by the Tucker firm. Those reasons are entirely  
3 immaterial and impertinent to the court's show cause order. The show cause order concerns a  
4 narrow matter: the representations made about the status of the ODC complaint in October 2013.  
5 Accordingly, even if the contentions made in the email about the termination of the Tucker firm are  
6 true, they have no bearing on whether the January 10, 2014 representations were false. Because the  
7 email is immaterial, the court may strike it. *Mazzeo*, 649 F. Supp. 2d at 1201-02. Accordingly, the  
8 court strikes the email (#109-2) and paragraph four of the affidavit (#109-1), which incorporates the  
9 email by reference.  
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12 Kapitan Affidavit and Email to the ODC (#s 109-3 and 109-4). The court denies the motion  
13 to strike. As with the Sullivan affidavit, the Kapitan affidavit presents background material that is  
14 only somewhat relevant. Much of the information is altogether unresponsive to the particular issue  
15 at the heart of the order to show cause. Nevertheless, to the extent the affidavit is irrelevant, it is not  
16 prejudicial and the court concludes the administration of justice in this case does not necessitate the  
17 striking of Kapitan's affidavit.  
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19 Supplemental Brief (#110). The court denies the motion to strike the supplemental brief.  
20 The brief merely explains the absence of an exhibit to the Sullivan affidavit due to the ODC's  
21 confidentiality rules.  
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23 Union defendants should take notice, however, that the contents of the grievances filed  
24 against Tucker by union defendants in 2013 have no relation to the particular issue before the court  
25 in the show cause order. Stated differently, the *content* of union defendants' professional complaints  
26 against Tucker in June 2013 have no bearing on whether Kapitan misrepresented the *status* of the  
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1 particular ODC matter in January 2014. Because the missing exhibit is immaterial, the court  
2 instructs union defendants not to file it, if and when the ODC permits its disclosure.

3 Show Cause Brief (#109). The court denies the motion to strike as to union defendants'  
4 show cause brief. Plaintiffs assert that the brief's introduction fails to include citations, that  
5 numerous statements are not directly supported by the affidavits or exhibits, and that some citations  
6 do not support the propositions for which they are cited (#114 at 11-12). Although the court agrees  
7 that the brief is untidy and somewhat unfocused, it cannot conclude that Kapitan and union  
8 defendants have failed to follow the court's instructions (*see* #105). Introductions regularly contain  
9 few citations to the record. The court is further satisfied, in reviewing the brief, that the essence of  
10 Kapitan's explanation for the discrepancies giving rise to the show cause order are adequately  
11 supported by the affidavits.<sup>1</sup>

12 Further, to the extent that the brief contains other minor inaccuracies and "recites a lot of the  
13 same themes" plaintiffs raised regarding the affidavits and emails (#114 at 12), the court assures  
14 plaintiffs that it remains focused on the narrow issue identified in the show cause order: whether  
15 Kapitan's representations at the January 2014 hearing were false, and if so, whether they are proper  
16 bases for sanctions under the court's inherent power. Union defendants' choice to focus on  
17 extraneous matters will neither prejudice plaintiffs nor hinder the court's ability to evaluate the  
18 evidence relevant to the court's forthcoming decision on sanctions.

#### 23 IV. CONCLUSION

24 The court has fully considered the motion and all other papers, and provides the order below.  
25 However, plaintiffs' reply intimates their confusion about the effect of this order. Plaintiffs claim  
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28 <sup>1</sup> The court expresses no opinion on whether those explanations sufficiently and persuasively demonstrate that sanctions against Kapitan and union defendants are unwarranted. Instead, the court's analysis pertains only to the compliance of the show cause brief with the requirements the court set forth in its show cause order.

1 that union defendants' briefs, affidavits, and exhibits may have a "significant impact . . . on the  
2 Plaintiffs and their Counsel" should they remain in the public record (#119 at 3). This order cannot  
3 seal the stricken items, for no proper motion to seal is before the court. If plaintiffs or counsel  
4 believe a removal of the stricken items is appropriate, plaintiffs must file a properly-supported  
5 motion to seal, which the court will consider in due course.  
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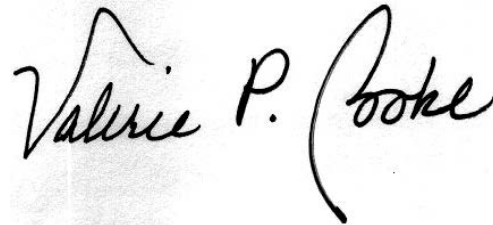
7 For the reasons articulated herein, the court **GRANTS AND DENIES IN PART** the motion  
8 to strike (#114), as follows:

- 9 (1) The court **STRIKES** paragraph four of the Sullivan affidavit (#109-1).  
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11 (2) The court **STRIKES** in its entirety the Sullivan affidavit's email exhibit (#109-2).  
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13 (3) Aside from these exceptions, the court **DENIES** the motion to strike (#114).

14 **IT IS SO ORDERED.**

15 **DATED:** November 19, 2014.

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**UNITED STATES MAGISTRATE JUDGE**